No. 75-1147

In the Supreme Court of the United States

OCTOBER TERM, 1975

GLAZERS WHOLESALE DRUG CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JAMES HIRSCHHORN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

CITATIONS

Cases:

Cases (Continued): Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1147

GLAZERS WHOLESALE DRUG CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decisions and orders (Pet. App. 20-26, 70-76) are reported at 209 NLRB 1152 and 211 NLRB 1063.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 18-19) was entered on November 28, 1975. A petition for rehearing (Pet. App. 19-20) was denied on December 31, 1975. The petition for a writ of certiorari was filed on February 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the facts of this case, the Board properly required the employer to bargain with the union for the entire certification year.

[1]The cases were consolidated in the court of appeals.

2. Whether the Board properly found that the employer violated its bargaining obligation by failing to notify and consult with the union before hiring permanent replacements at wages higher than it had previously offered its striking employees.

3. Whether the Board properly required the employer to reimburse the strikers whom it reinstated for what they would have earned had they been paid at the wage rates unilaterally extended to the replacements.

4. Whether substantial evidence supports the Board's finding that the employer discharged employee Wilson for engaging in union activity.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *Background*

Petitioner is in the wholesale liquor business in San Antonio, Texas (Pet. App. 29-30). In February 1973 the

Union[2] began an organizing campaign among the drivers and warehousemen at petitioner's San Antonio warehouse (Pet. App. 31). On April 5, 1973, the Union unanimously won a Board-conducted election, and on April 13 the Board certified the Union as the bargaining representative of the drivers and warehousemen (Pet. App. 31, 79).

2. *The discharge of Nathan A. Wilson*

Employee Nathan A. Wilson was conspicuously active in the Union's campaign. He spoke about the Union to every employee in the unit[3] and obtained five or six authorization cards (Pet. App. 49-50). Warehouse manager Louis Villarreal, Wilson's immediate supervisor, worked in constant contact with the employees. He was strongly opposed to the Union and had made threats and promises of benefit to other employees. The Board found that these threats and promises violated Section 8(a)(1) of the Act (Pet. App. 40-44). Villarreal admittedly heard rumors of Wilson's union activity, and he coercively interrogated two employees about it (Pet. App. 40-41, 58-59).[4]

Petitioner has a rule requiring employees to report expected absences in advance (Pet. App. 54). On March 27, 1973, Wilson was ill and did not report for work (Pet. App. 50). Mrs. Wilson testified that she called in for her husband at 6:30 a.m. that morning, but the message never reached Villarreal (Pet. App. 50, 56). When Wilson reported at the normal time on March 28 Villarreal told him that he had been discharged (Pet. App. 50).

---

[2]Retail Clerks Union, Local No. 455.

[3]The unit contained 15 to 20 employees (Pet. App. 79, n. 1).

[4]The Board found that this interrogation violated Section 8(a)(1) of the Act (Pet. App. 40-43). The Board's Section 8(a)(1) findings respecting Villarreal were sustained by the court of appeals and are not at issue here.

Later that day Wilson returned to the warehouse and asked the branch manager, James Christie, why he had been discharged. Christie in turn questioned Villarreal, who told him that Wilson had not called in his absence on March 27 and on previous occasions. Villarreal also said that Wilson was otherwise a good worker (Pet. App. 51). Christie said he would support Villarreal's decision. He then gave Wilson a statement, written by Villarreal, which stated that Wilson had been warned on three or four previous occasions when he had failed to call in absences or latenesses (Pet. App. 50).

The Board found that the call-in rule was enforced entirely at Villarreal's discretion, and that he waived it when in his opinion an employee had a good excuse for his absence (Pet. App. 57-58). On March 28 Villarreal did not give Wilson a chance to explain the previous day's absence, but discharged him on arrival at the warehouse, saying that he had no further use for him (Pet. App. 50, 58).

3. *The unilateral change in wages*

After failing to reach an agreement with petitioner, the Union struck from October 25, 1973, until approximately December 5, 1973 (Pet. App. 79). At the conclusion of the strike, which was unsuccessful, all of the strikers who desired reinstatement apparently received it (*ibid.*).

During the strike petitioner continued operations with replacements. A substantial number of the replacements were paid as much as nine cents an hour more than the employees they replaced and as much as five cents an hour more than the highest proposal petitioner had made to the Union during collective bargaining (Pet. App. 87). Petitioner did not notify or consult with the Union about the wages paid to the replacements (*ibid.*).

4. *The poll and withdrawal of recognition*

On November 29, 1973, in response to a request by the Union for a bargaining session on December 7, petitioner

stated that it would agree—"provided, of course, that the Union still represents a majority of the employees" (Pet. App. 80).

On December 5, 1973, petitioner polled the employees in the unit, including the replacements, on the question whether they wished the Union " 'to NOW represent' them in collective bargaining" (Pet. App. 81). Paper ballots and a ballot box were used. Petitioner's branch manager informed the employees that the poll would be secret and that no reprisals would be taken regardless of how they voted (Pet. App. 81-82). The employees voted 13 to 3 against the Union; three employees abstained (Pet. App. 82).

On December 6, 1973, petitioner's counsel informed the Union by telegram that, because the Union did not "now" represent a majority of the unit employees, he would not meet with the Union for further negotiations. Petitioner has continued to refuse to recognize the Union as the bargaining agent for its employees (Pet. App. 83).

B. THE BOARD'S DECISIONS AND ORDERS

The Board held that the reasons given by petitioner for Wilson's discharge were pretextual and that the discharge was in fact motivated by Wilson's union activity, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 21, 61). The Board ordered petitioner to cease and desist from discriminating against employees on the grounds of their union activity and to reinstate and make whole Nathan Wilson (Pet. App. 66).

In a separate decision the Board held that petitioner had violated Section 8(a)(5) of the Act by polling its employees about their union sympathies and then withdrawing recognition from the Union four months before the end of the certification year (Pet. App. 83-84, 88). The Board also held that petitioner had unilaterally changed its wage structure in violation of Section 8(a)(5) of the Act by paying

replacements for strikers five cents an hour more than the increased wage it had offered to the Union (Pet. App. 86-87). The Board ordered petitioner to recognize and bargain collectively with the Union for a period of four months from the date on which it commences bargaining in good faith. The Board further ordered petitioner to make the reinstated strikers whole by paying them at the wage rate instituted for the replacements (Pet. App. 71-73).

C. THE COURT OF APPEALS' DECISION

The court of appeals summarily enforced the Board's orders (Pet. App. 18-19).

ARGUMENT

1. In *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, this Court approved the Board's rule that, absent unusual circumstances, an employer is obliged to bargain with a union certified after an election for a reasonable period, normally one year, even if the union no longer represents a majority of the employees. Petitioner contends (Pet. 9-11) that this rule has been "arbitrarily and capriciously" applied to it since its poll, taken four months before the end of the certification year, "objectively" demonstrated loss of majority by the Union.

Petitioner misconceives the basis of the *Brooks* principle. In *Brooks*, as here, the employer had established that a majority of its employees no longer supported the union. 348 U.S. at 97. But there, as here, the employees' repudiation had come within one year of a valid election, during which Section 9(c)(3) of the Act, 29 U.S.C. 159(c)(3), forbids another election. In these circumstances, the Court held, the Board's requirement that the employer bargain for one year furthered the congressional interest in industrial stability and thus was well within the Board's discretion. 348 U.S. at 103-104.

In short, *Brooks* did not turn on the source or certainty of the employer's knowledge of employee defections from

the union. It turned on the Act's policy that an established union-employer relationship should be given an adequate opportunity to function. 348 U.S. at 103.

Since no collective bargaining relationship exists when a union demands recognition for the first time and has not been certified, the asserted decline and fall of the "good faith doubt" standard in that situation[5] has no relevance to this case. Indeed, in *Brooks* this Court rejected any analogy between informal recognition and withdrawal of recognition as an attempt "to make situations that are different appear the same." 348 U.S. at 104. For a similar reason decisions related to the source of an employer's knowledge of employee defections from the union after the certification year has ended are inapposite. *Wanda Petroleum Co.*, 217 NLRB No. 62 (1975).

This case does not conflict with *National Labor Relations Board* v. *Alva Allen Industries, Inc.*, 369 F.2d 310 (C.A. 8). In *Alva Allen* the Board found that with 11 days remaining in the certification year the union had abandoned its efforts to represent the employees. This behavior, the Eighth Circuit held, constituted an "unusual circumstance" which justified a subsequent refusal to bargain by the employer. See also *Brooks, supra*, 348 U.S. at 98. No abandonment by the union or other comparable circumstance is present here.

2. The second issue raised by petitioner (Pet. 4, 11-14)—whether petitioner had the right, without consulting the Union, to hire replacements and pay whatever was required to continue operations—is not presented by this record. The Board accepted *arguendo* petitioner's contention that it was economically necessary to pay a higher rate in order to induce replacements to cross the picket line (Pet.

---

[5]See *Linden Lumber Division* v. *National Labor Relations Board*, 419 U.S. 301, 304-305; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 590-595.

App. 87). However, it does not follow from that premise that petitioner was relieved of its obligation to notify and consult with the employees' bargaining representative before hiring permanent replacements at the higher rate. As this Court has stated, "even after an impasse is reached [an employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 745.[6] See also *National Labor Relations Board* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768, 771-772 (C.A. 9).

3. The portion of the Board's order that requires petitioner to make reinstated economic strikers whole by giving them the benefit of the rate paid the replacements is within the Board's remedial powers. The Board has broad discretion to formulate affirmative relief in order to effectuate the policies of the Act. See, *e.g.*, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215-216; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347. The Board's order in this case takes the familiar form of requiring the employer to eradicate the effects of unilateral changes in wages that differentiate between strikers and non-strikers. See, *e.g.*, *Sinclair Glass Co.* v. *National Labor Relations Board*, 465 F.2d 209, 210-211 (C.A. 7); *National Labor Relations Board* v. *Aero-Motive Manufacturing Co.*, 475 F.2d 27, 28 (C.A. 6).

Contrary to petitioner's contention (Pet. 14-15), this decision does not conflict with *Culinary Alliance & Bartenders Union Local 703* v. *National Labor Relations Board*,

[6] In *Pacific Gamble Robinson Co.* v. *National Labor Relations Board*, 186 F.2d 106 (C.A. 6), upon which petitioner relies (Pet. 12), the employer paid strike replacements no more than the permanent rate which had been offered to the union and rejected. *Id.* at 109-110.

488 F.2d 664 (C.A. 9), and *Int'l Union of Electrical, Radio & Machine Workers* v. *National Labor Relations Board (Tiidee Products, Inc.)*, 426 F.2d 1243 (C.A. D.C.). *Tiidee Products* held that, where the employer had refused recognition in flagrant bad faith, the Board has the statutory power to award some make-whole relief that would prevent the employer from "having a free ride during the period of litigation." 426 F.2d at 1251. This relief, the court of appeals stated, might include wages and benefits "it is likely the parties *would* have agreed to." *Id.* at 1252; emphasis in original.[7] In *Culinary Alliance* the Ninth Circuit held only that the facts of the case did not show sufficient bad faith by the employer to raise the issue whether the court should require the make-whole relief suggested in *Tiidee Products*. 488 F.2d at 666. The order in this case, on the contrary, does not compel petitioner to pay a wage rate it "would" have paid but never actually did pay. Petitioner already had extended the wage rates in question to a portion of its employees, and the Board's order simply requires it to undo the effect of its unilateral change in the manner least harmful to the entire work force.

4. The final question presented (Pet. 4, 15-17)—whether the General Counsel sustained his burden of proof that Wilson's discharge was discriminatorily motivated—raises only an evidentiary question which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the evidence summarized at pages 3-4, *supra*, supports the Board's findings.

[7] On remand the Board found that it was impossible to determine whether the parties would have agreed to any particular terms at any given time. *Tiidee Products, Inc.*, 194 NLRB 1234, 1235, enforced as modified, 502 F.2d 349 (C.A. D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JAMES HIRSCHHORN,
Attorney,
National Labor Relations Board.

MARCH 1976.

DOJ-1976-03